FILE COPY

192

Office - Supreme Court, U. S.
FILED
JUN 12 1946
CHARLES ELMORE CROPLEY
CLERK

749468
Sup. Ct.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

PAYSOFF TINKOFF,
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 178

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT.

PAYSOFF TINKOFF,
Petitioner-Appellant, Pro Se.

UNITED STATES LAW PRINTING CO., PHONE LAKEVIEW 6891, CHICAGO, ILL.

INDEX.

PAGE

(A) Petition for Writ of Certiorari 1-10

I. Jurisdiction 1

II. Questions Presented 2

III. Summary Statement of the Facts 2-9

(B) Brief in Support of Petition for Writ of Certiorari 10-21

I. Jurisdiction 10

II. Statement of Facts 10

III. Propositions of Law and Authorities Relied Upon 10-11

IV. Argument 12-21

(A) The Order Denying the Issuance of a Subpoena Duces Tecum in a Proceeding to Perpetuate the Testimony of a Material Witness Whose Testimony Is the Sole Basis to Support and Prove Up an Action to Be Instituted, Is a Final Order and Appealable 12-19

(B) A Proceeding to Perpetuate the Testimony of Material Witnesses, Filed Pursuant to Rule 27 of the Rules of Civil Procedure for the District Courts of the United States, Is an Independent and Complete Proceeding in Itself,

PAGE

and the Order Denying or Granting the Petition to Perpetuate the Testimony of the Said Witnesses Is a Final and Appealable Order 20

(C) A Final Decision Is One Which Ends the Litigation Upon the Merits and Leaves Nothing for the Court to Do But Execute the Judgment 20

(D) Conclusion 20-21

CITATIONS AND AUTHORITIES.

Catlin, et al., v. United States, 65 S. Ct. 631 ..... 11, 20

Cobbledick v. United States, 309 U. S. 323; 60 S. Ct. 540 ..... 10, 16, 17

Durkin v. Hey, 376 Ill. 292, 297 ..... 10, 17

Ellis v. Interstate Commerce Commission, 237 U. S. 434 16

Interstate Commerce Commission v. Baird, 194 U. S. 25 ..... 10, 18

Interstate Commerce Commission v. Brimson, 154 U. S. 477 16

National Nut Company v. Kelling Nut Company, 134 Fed. (2) 532 10

State of Arizona v. State of California, 292 U. S. 341, 347; 54 S. Ct. 735 ..... 10, 14, 15

United States v. Paysoff Tinkoff, 129 Fed. (2) 21 ..... 7, 13, 14, 21

PAGE

TEXTS AND RULES.

Pomeroy on Equity Jurisprudence, 5th Ed..... 15

Rule 27(a) (1)(1) 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

PAYSOFF TINKOFF, *Petitioner-Appellant,* vs. UNITED STATES OF AMERICA, *Respondent-Appellee.*	No. .....

(A)

PETITION FOR WRIT OF CERTIORARI.

To The Honorable, The Justices Of The Supreme Court Of The United States:

Now comes Paysoff Tinkoff, appearing *pro se,* and petitions this Court that an order be entered, directing that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit, in this proceeding, and in support thereof your Petitions alleges:

I.

Jurisdiction.

This proceeding is brought pursuant to 28 U. S. C. A. 350.

II.

Questions Presented.

The question presented in this Petition for Certiorari, is whether an order entered by a trial court, denying the issuance of Subpoenas duces tecum, in a proceeding to perpetuate the testimony of various witnesses, brought in pursuance of Rule 27 of the Rules of Civil Procedure for the District Courts of the United States, is a *final appealable order?*

III.

Summary Statement Of The Facts.

The record shows that this proceeding was dismissed by the United States Circuit Court of Appeals for the Seventh Circuit, 153 Fed. (2) 106, on Feb. 15, 1946 on the ground that the Appellate Court, on its own motion, found that it had no jurisdiction of the appeal, in that the order appealed from was not a final order, and therefore not appealable.

The facts show that the Petition-Appellant (Paysoff Tinkoff) under Rule 27 of the Rules of Civil Procedure aforementioned, to obtain *evidence* within the knowledge of various witnesses, in order to make supporting affidavits to support a Petition to be filed with the United States Circuit Court of Appeals for the Seventh Circuit, to obtain leave from that Court to file a Petition in the Nature of a Writ of Error Coram Nobis, with the United States District Court, or Trial Court, so as to endeavor to vacate a judgment entered in a criminal proceeding in Cause No. 25,555, United States District Court Northern District of Illinois, Eastern Division, *United States* v. *Paysoff Tinkoff,*

in 1934, wherein Petitioner sought to show that the judgment entered in the said criminal proceeding, in 1934, was void, on the ground that the same had been obtained as the result of a conspiracy existing between the federal prosecuting officials and interested witnesses, and especially a co-defendant in the criminal proceeding aforementioned, said William J. Newman, with whom the appellant was indicted with aiding to evade income taxes of William J. Newman and William J. Newman Co.

As the question upon which this cause was dismissed was that there existed no final appealable order, the issues raised by the record were not considered by the Appellate Court, on the ground that it lacked jurisdiction.

The material facts alleged in the petition, in order to obtain the subpoenas duces tecum to perpetuate the testimony of various material witnesses, were the following:

The Petition to Perpetuate the said testimony of William J. Newman and others alleged in substance, that the said conviction of Paysoff Tinkoff was obtained as a result of a fraud perpetrated upon the trial court, due to a conspiracy existing between William J. Newman and his employees, and especially Thomas F. Gayer, his auditor, and the prosecuting officials of the United States, where the prosecuting officials agreed with said William J. Newman and Thomas F. Gayer not to prosecute them—they having admitted their guilt in violating the law in evading the Income taxes upon which the criminal indictment was based—on condition that they would shift the responsibility for the said violation, and to testify falsely on the trial of Paysoff Tinkoff, that said appellant, Paysoff Tinkoff, was guilty in aiding and abetting said William J. Newman and Thomas F. Gayer to evade the taxes of William J. Newman and William J. Newman Company.

The petition further alleged that during a conference at Washington the following statement was made by one of the prosecuting officials, an Assistant United States District Attorney General, same being in substance as follows:

> "Mr. Newman, we know you are telling the truth in saying you are guilty, and that Mr. Tinkoff is innocent. We don't want you. We want to get Mr. Tinkoff. We are out after him, not you. Now, if you will not testify so, and shift the blame to Mr. Tinkoff, then we will go after you, and be hard on you. Think it over and let us know."

The petitioner further alleged, that William J. Newman personally directed his auditor, Thomas F. Gayer, to willfully omit substantial items totalling several hundred thousand dollars from the books of the William J. Newman Company, especially relating to payments received from the City of Chicago in the widening of LaSalle Street.

The petition further alleged that said William J. Newman admitted his guilt and maintained the innocence of Paysoff Tinkoff, the appellant, and that he testified to the said prosecuting officials under oath in substance as follows:

> "That he personally took graft payments totalling several million dollars, which he distributed to public officials; that he would spend the rest of his life in jail before he would disclose the recipients of these payments, and further that if he did disclose the same, he would not live twenty-four hours."

The petition further alleged that the prosecuting officials had knowledge of these facts, but had conspired with said William J. Newman, and his employees, that said William J. Newman, and his employees, should testify falsely and commit perjury, and shift the responsibility for the violating of payment of taxes from said William J. Newman to the appellant, Paysoff Tinkoff, whom they knew to be innocent

The petition further alleges that the said prosecuting officials agreed to compromise a tax of One Million, Six Hundred Thousand Dollars ($1,600,000.00) due from William J. Newman, with William J. Newman for $75,000.00, and further that they would assist him in obtaining a government contract in excess of $1,500,000, from which it was estimated he would make $150,000 profit, so as to pay the tax of $75,000.00 to be compromised.

The petition further alleges that substantial records were lost during appeal of the criminal case, No. 25,555, while in the possession of the prosecuting officials of Chicago, Illinois, and that further exhibits were lost during the bankruptcy proceedings of William J. Newman subsequent to 1934, by said prosecuting officials.

The Petition further alleged that the prosecuting officials in the bankruptcy proceeding of William J. Newman, No. 58282, having personal knowledge that the said books and records of William J. Newman and William J. Newman Co., were false, and that two sets of books were kept, and that they were destroyed, did not object to the discharge of said William J. Newman as a bankrupt, but strenuously did object to the petition of Paysoff Tinkoff objecting to the discharge of William J. Newman; and that the said prosecuting officials in further carrying out the said conspiracy, did, in said bankruptcy proceeding, allow the said William J. Newman to purchase property which had an original investment of $1,200,000, known as the Lake Delton Property, in Wisconsin, for a consideration of $2,000 only, and that this transaction was made with the approval of the prosecuting officials and the Bankruptcy court, on motion only, *without giving the ten day notice required to the creditors.*

The petition further alledged that the prosecuting officials even failed to enforce the compromise tax settlement of $75,000 made with said William J. Newman, and that no additional taxes were collected from said William J. Newman on the $75,000 compromise offer, except the $12,000 originally paid.

The petition further alleged that pursuant to the said conspiracy said William J. Newman was to assist, and did assist, the government in the prosecution of Paysoff Tinkoff, by having his own (Newman's) auditors assist the United States attorneys and their auditors.

That all of these allagations were made in the petition, and the trial court pursuant thereto, did enter an order that the said testimony of William J. Newman, Thomas F. Gayer, Manuel I. Goldfine and others, be perpetuated.

That pursuant to said order your petitioner did examine the auditor, Manuel I. Goldfine and Herman Berman, who did business under the name of Marshall Berman and Company, and each of whom testified he had no knowledge of the said audit made by them,—although the same lasted four years,—and that all records of every kind or nature relating to William J. Newman and the William J. Newman Company accounts, even including the personal records of Marshall Berman and Company, relating to the Newman accounts, had been lost or destroyed, without any accounting being made therefor, prior to said statements.

That the said William J. Newman and Thomas F. Gayer, repeatedly refused to attend the hearings and obey the orders of the court, and that several rules to show cause were entered, and that prior to said William J. Newman testifying, said William J. Newman died in June, 1943.

That your petitioner obtained additional orders to examine various other witnesses, to-wit, Abe Salitsky, George W. Griffiths, Nora Newman and others, all of whom testified that any and all records relating to the said William J. Newman transactions had been destroyed, and that they had no recollection or present knowledge of any of the said transactions with the said William J. Newman or the William J. Newman Co.

That several certificates and an affidavit was filed by the personal physician of Thomas F. Gayer stating that he had suffered a heart attack and if examined by Appellant, may lead to the death of Thomas F. Gayer; though Thomas F. Gayer had been employed at all times, except a short period, as a Clerk in the Municipal Court of Chicago.

That due to the death of William J. Newman, and to the inability to examine Thomas F. Gayer, auditor; and also due to the inability of the Appellant to serve various subpoenas on the witnesses Edward J. Sweeney and Joseph Stephens; and further due to the fact that the witnesses, who were served, and examined, all denied having any recollection or knowledge of any transactions with William J. Newman or W. J. Newman Company, and all testified that any and all records relating to the said transactions, had been destroyed; the appellant thereafter filed the petition to perpetuate the testimony in the possession of prosecuting officials,—*i.e.*, the Attorney General of the United States, and the District Attorney for the Northern District of Illinois, Eastern Division,—limiting the said examination of said prosecuting officials solely to statements made to and by the individuals who had been subpoenaed as witnesses in this proceeding, to wit: by William J. Newman, Nora Newman, Thomas F. Gayer, Abe Salitsky and others (R. 48to 51 inc.), whose testimony your Ap-

pellant was unable to obtain, and if obtainable, denied any recollection of the same.

The United States District Court denied the Petitioner the order to perpetuate the evidence in possession of the Attorney General of the United States and the District Attorney for the Nothern District of Illinois, Eastern Division; and further denied the motion of your Petitioner to have a material witness, said Thomas F. Gayer, who contended that he was sick, examined by an impartial physician appointed by the Court, said costs therefor to be paid by you Petitioner, the testimony of said Thomas F. Gayer, being vital and material, as he was the Auditor of William J. Newman.

That as aforementioned, the United Sates Circuit Court of Appeals for the Seventh Circuit, under date of July 7, 1942, denied the Petitioner his motion for leave to file a Petition in the United States District Court, Nothern District of Illinois, Eastern Division, for a Writ of Error in the Nature of a Writ of Error Coram Nobis, and Petition to Vacate, Set Aside and Expunge the Judgment of Conviction on July 30, 1934 (See *United States of America* v. *Paysoff Tinkoff*, 129 Fed. (2) 21), and this proceeding to perpetuate the testimony of the material witnesses, was to cure that defect.

Wherefore, your Petitioner prays that an order be entered by this Court, directing that a Writ of Certiorari issue from this Court to the United States Circuit of Appeals for the Seventh Circuit, to certify the record in Cause No. 8785, *United States of America* v. *Paysoff Tinkoff*, so that this Court can review the errors of law committed by the said Circuit Court of Appeals in this proceeding, and your

Petitioner further prays for such other and further relief as may be just in the premises.

.....

Paysoff Tinkoff
Petitioner-Appellant

State Of Illinois
County Of Cook—ss.

Paysoff Tinkoff, being first duly sworn, alleges that he is the Petitioner herein; that he has read this Petition, and that all the allegations made herein are true in substance and in fact, as alleged.

.....

Paysoff Tinkoff

Sworn To and Subscribed
before me this 10th day
of June, A. D. 1946.

Notary Seal.

E. L. Coburn

.....

Notary Public.

My Commission Expires May 3, 1949.
E. L. Coburn

(B)

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Jurisdiction.

This proceeding in brought pursuant to 28 U.S.C.A. 350.

II.

Statement Of Facts.

The facts, which are fully alleged in the Petition for Certiorari, are incorporated herein by reference and not repeated, so as to avoid additional labor to this Court.

III.

Propositions Of Law And Authorities Relied Upon.

(A)

1. **A proceedings to perpetuate the testimony of material witnesses, filed pursuant to Rule 27 of the Rules of Civil Procedure for the District Courts of the United States, is an independent and complete proceeding in itself, and the order denying or granting the petition to perpetuate the testimony of the said witnesses is a final and appealable order.**

State of Arizona v. *State of California*, 292 U. S. 341, 347; 54 S. Ct. 735.

Durkin v. *Hey*, 376 Ill. 292, 297.

Interstate Commerce Commission v. *Baird*, 194 U. S. 25.

Cobbledick v. *United States*, 309 U. S. 323; 60 S. Ct. 540.

National Nut Company v. *Kelling Nut Company*, 134 Fed. (2) 532.

(B)

2. The order denying the issuance of a subpoena duces tecum, in a proceeding to perpetuate the testimony of a material witness, whose testimony is the sole basis to support and prove up an action to be instituted, is a final order and appealable.

See authorities cited under proposition of Law No. I above.

(C)

3. A final decision is one which ends the litigation upon the merits and leaves nothing for the Court to do but execute the judgment.

See *Catlin, et al.*, v. *United States*, 65 S. Ct. 631.

IV.

ARGUMENT.

(A)

The Order Denying The Issuance Of A Subpoena Duces Tecum, In A Proceeding To Perpetuate The Testimony Of A Material Witness Whose Testimony Is The Sole Basis To Support And Prove Up An Action To Be Instituted, Is A Final Order And Appealable.

The Petitioner, Paysoff Tinkoff, has been endeavoring to show since the entry of his conviction in 1934, finding him guilty of wilfully aiding and abetting William J. Newman and William J. Newman Company in evading Federal Income and Excess Profits Taxes of the the said William J. Newman and William J. Newman Company, that the said conviction was brought about as the result of a conspiracy between said William J. Newman, and his auditor, Thomas F. Gayer, and other employees, and the Prosecuting Officials, wherein it was agreed that said William J. Newman and Thomas F. Gayer, his auditor, would testify falsely against your Petitioner in the criminal proceeding; that said William J. Newman would plead guilty and get off with a small fine and no imprisonment term; and that the entire responsibility for the wilfull evasion of W. J. Newman and W. J. Newman Company taxes should be shifted to your Petitioner.

That said testimony to shift said responsibility to Paysoff Tinkoff, said William J. Newman, Thomas F. Gayer and the Prosecuting Officials knew to be false and perjured, and they also knew that Paysoff Tinkoff was innocent; and as a result thereof a fraud was practiced upon the Court; and it was in order to substantiate such conspiracy, fraud and illegal conviction that the proceedings to perpetuate the testimony of the material witnesses was instituted.

The United States Circuit Court of Appeal for the Seventh Circuit on July 7, 1942 denied a motion of the Appellant that an order be entered, granting leave to file a petition for a Writ of Error in the nature of a Writ of Error Coram Nobis with the trial court which entered the judgment of conviction, on the ground that the said petition lacked supporting affidavits to show to the said Appellate Court that a *prima facie* case was or could be established, to grant the Writ of Error Coram Nobis, and it is to cure that defect, as found by the Court, in the case of *Paysoff Tinkoff* v. *United States,* 129 Fed. (2) 21, that the Petitioner-Appellant endeavored to perpetuate the testimony of the Attorney General of the United States, and also the United States District Attorney for the Northern District of Illinois, Eastern Division, limiting such examination of the prosecuting officials solely to statements made to and by the individuals who had been subpoenaed as witnesses in this proceeding to perpetuate their testimony, and, whose testimony could not be obtained due to the fact that some of the parties had died, and all the others maintained that they had no recollection or knowledge of the transactions, and further that all records had been destroyed.

The proceeding was brought under Rule 27(a) of the Rules of Civil Procedure for the District Courts of the United States, and this rule specifically provides for the taking of depositions before trial, by the institution of proceedings similar to that of instituting a new suit.

This rule further provides that the proceeding should be instituted by the filing of a petition, and especially that the said petition shall allege, among other things, under Rule 27 (a)(1)(1), as follows:

> "that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, * * *"

As stated by the court in the case of *United States* v. *Paysoff Tinkoff*, 129 Fed. (2) 21, leave was denied by the Appellate Court to file a Petition for Writ of Error in the nature of a Writ of Error Coram Nobis with the trial court, because the said petition in the Appellate Court was not coupled with affidavits which would show that a *prima facie* case was established.

The record further shows that the only information which was sought to be obtained from the Attorney General of the United States and also the District Attorney for the Northern District of Illinois, Eastern Division, related to that information given by the various witnesses who had died, and who had refused to answer when subpoenaed, and that the petitioner was not endeavoring to obtain any other information relating to the private or confidential files of the Attorney General of the United States or the District Attorney.

The order denying the issuance of the *subpoena duces tecum* in substance denied the right to take the depositions of the witnesses in whose possession was the only evidence which the petitioner could obtain in order to file the necessary petition with supporting affidavits or allegations, with the United States Circuit Court of Appeals, to obtain leave to file this petition for Writ of Error Coram Nobis, aforementioned, in the United States District Court.

This question has been decided by the Court in the case of *State of Arizona* v. *State of California*, 292 U. S. 341, on page 347, where this Court said:

> "Bills to perpetuate testimony have been known as an independent branch of equity jurisdiction before the adoption of the constitution. * * * *The sole purpose of such a suit is to perpetuate the testimony.*" (Italics supplied.)

So, in the present case, the sole purpose of the present proceeding was to parpetuate the testimony of the various witnesses whose evidence was necessary in order to bring a suit, which suit the petitioner was unable to institute without the obtainance of said evidence.

The author in Pomeroy on Equity Jurisprudence, 5th Edition, page 358, says:

> "A suit to perpetuate testimony could only be maintained where the plaintiff had at some time some right vested or contingent, to which the testimony would relate, but such right could not *then* be investigated, established or defended by an action at law."

And on page 360, the author further says:

> " * * * But if the party cannot possibly bring the matter before the court so that his right or claim can be adjudicated at once, *the equity suit to perpetuate testimony can be maintained.* * * * The reason given by the cases is that the only evidence in support of the plaintiff's right may be lost by the death of his witnesses; and the adverse party may delay to move in the matter for the very purpose of obtaining the the advantage resulting from such an event." (Italics supplied.)

And on page 361, the author further says:

> "*The cause does not proceed any further than the examination of the witnesses. The suit is then really at an end.*" (Italics Supplied.)

Therefore, the petitioner respectfully contends that under the common law, and pursuant to the decision of this court in the case of *State of Arizona* v. *State of California,*

supra, the sole purpose of a proceeding to perpetuate the testimony is to perpetuate the testimony, and that when the said testimony is perpetuated the proceeding is then at an end.

The corollary must follow, that if the court denies the right to perpetuate the testimony, the denial of such a right is subject to review by an Appellate Court, and is therefore a final appealable order, as provided for in 28 U. S. C. A. 225, allowing only "final orders" to be reviewed by the Circuit Court of Appeals.

This court has, in proceedings under the Interstate Commerce Act, in order to take the testimony of witnesses pursuant to the said Act, in the case of *Cobbledick* v. *United States*, 309 U. S. 323; 60 S. Ct. 540, citing the cases of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; and *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, held that these proceedings under Section 12 of the Interstate Commerce Act were not ancillary proceedings, but were independent and final proceedings, from which an appeal could be taken, and were, therefore, reviewable; and, as stated by the Court in the *Cobbledick* case, on page 543, of 60 S. Ct., *supra*:

> "In these cases the orders of the District Court directing the witness to answer have been held final and reviewable."

And the Court further says, on page 543:

> "After the court has ordered a recusant witness to testify before the Commission there remains nothing for it to do. Not only is this true with respect to the particular witness whose testimony is sought; there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal. The proceed-

ing before the district court is not ancillary to any udicial proceeding. *So far as the court is concerned it is complete in itself.*" (Underscore supplied.)

The Supreme Court of Illinois, in the case of *Durkin* v. *Hey*, 376 Ill. 292, in determining the question that a party had a right to appeal from an order of the court directing him to produce certain books and records relating to determining his tax liability before an Administrative body, under the Unemployment Compensation Act of Illinois, said on pages 296 and 297, as follows:

"Appellee claims, in his motion to dismiss the appeal, that this was not a final appealable order but merely interlocutory.

"In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 59 L. ed. 1036, where the trial court ordered a witness to answer questions and produce records in an inquiry by the Interstate Commerce Commission, the United States Supreme Court, on appeal, said: 'There is no doubt that this appeal lies. The order is not like one made to a witness before an examiner or on the stand in the course of a proceeding *inter alios* in court. (*Alexander* v. *United States*, 201 U. S. 117, 50 L. ed. 686, 26 S. Ct. 356.) *It is the end of a proceeding begun against the witness.—Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. 563.' (Italics supplied.)

"In the *Baird* case, cited above, which was also a proceeding for compulsory production of evidence before the Interstate Commerce Commission, the Supreme Court said: 'The present proceeding is not merely advisory to the commission, but as was said in *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 14 Sup. Ct. 1125, a judgment rendered will be final and indisputable basis of action as between the commission and the defendant and furnish a precedent for similar cases. While it has for its object the obtaining of testimony in aid of proceed-

ings before the Commission, it is evident that important questions may be involved touching the power of the commission and the constitutional rights and privileges of citizens.'

"Thus, this class of cases is readily distinguishable from orders to produce documentary evidence in a cause pending in the same court. *Lester* v. *Berkowitz,* 125 Ill. 307, and *Illinois Trust and Savings Bank* v. *Howard,* 185 *id.* 332, relied upon by appelleee, are of the latter class. Preliminary orders in a pending suit are not appealable because they are reviewable on appeal from the final order in the suit. *In the case at bar there is no such suit pending.* We do not regard the cases relied upon by appellee as controlling here. Under the *Ellis* and the *Baird* case, *supra,* our conclusion is that the order is final and appealable. The motion to dismiss the appeal is denied." (Italics supplied.)

This court in the case of *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, on page 38, says as follows:

"Before the passage of this act this court held that a petition filed under section twelve of the interstate commerce act against a witness duly summoned to testify or to produce books, documents and papers relating to the matter in controversy, makes a case or controversy to which the judicial power of the United States extends. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447. * * * The present proceeding is not merely advvisory to the commission; but as was said in *Interstate Commerce Commission* v. *Brimson, supra,* a judgment rendered will be final and indisputable basis of action as between the commission and the defendant, and furnish a precedent for similar cases. While it has for its object the obtaining of testimony in aid of proceedings before the commission, it is evident that important questions may be involved touching the power of the commission and the constitutional rights and privileges of citizens. Congress deemed it

> imperative that such cases, affected the commerce of the country, as well as personal rights, should be promptly determined in a court of last resort."

The petitioner therefore respectfully submits that the denial of the order to issue a *subpoena duces tecum*, directed to the Attorney General of the United States, and the District Attorney for the Northern District of Illinois, was, in substance and in fact, *a denial of the deposition itself, and thus terminated the proceeding, and was therefore a final appealable order.*

The record shows that the only information in evidence, upon which the petitioner could base the proceeding intended to be instituted in the Circuit Court of Appeals for the Seventh Circuit, was in possession of the said parties, Attorney General of the United States and the District Attorney, aforementioned; and that the denial to issue the *subpoena duces tecum* to the said officers was final and not ancillary or incidental to the proceeding, and terminated the said proceeding, and thus gave either interested party to said proceeding a right to appeal in order to determine whether their rights have or have not been violated by the action of the court.

The best argument that the Petitioner has to show that the said orders of the trial court are final appealable orders, is the present predicament in which the Petitioner now finds himself, *i.e.*, his inability to proceed further to substantiate his charges of fraud and collusion against the prosecuting officials and the said interested parties, and to further show his innocence and allegal conviction, because failing to obtain the evidence will result in the Petitioner being unable to file the supporting affidavits to the Petition to be filed with the United States Circuit Court of Appeals for the Seventh Circuit, for leave to file a Petition for Writ of Error in the nature of a Writ of Error Coram Nobis with the trial court.

(B)

A Proceeding To Perpetuate The Testimony Of Material Witnesses, Filed Pursuant to Rule 27 Of The Rules Of Civil Procedure For The District Courts Of The United States, Is An Independent And Complete Proceeding In Itself ,And The Order Denying Or Granting The Petition To Perpetuate The Testimony Of The Said Witnesses Is A Final And Appealable Order.

The argument under this proposition of law is fully answered by the statements and authorities submitted under the Argument of Proposition (A) above.

(C)

A Final Decision Is One Which Ends The Litigation Upon The Merits And Leaves Nothing For The Court To Do But Execute The Judgment.

This proposition of law is so elementary that no additional authorities are necessary, except the case of *Catlin et al.* v. *United States,* 65 S. Ct. 631, nor is any further argument necessary thereon.

(D)

Conclusion.

Your Petitioner has been endeavoring to show, since 1934, that a fraud had been practiced upon the trial court by the prosecuting officials in bringing about the illegal conviction of your Petitioner, and that the evidence to establish that is within the possession of the said parties to the conspiracy, to-wit, the prosecuting officials, William J. Newman and Thomas F. Gayer, his auditor; and as William J. Newman has died, and as the Trial Court has

excused Thomas F. Gayer from testifying an account of illness, the only individuals who have this evidence are the prosecuting officials aforementioned.

Your Petitioner is seeking only to establish truth and justice, and to show that in this particular case a gross injustice has been done to your Petitioner, and with the denial of the issuance of a *subpoena duces tecum* against the prosecuting officials, your Petitioner alleges that he will at all times be deprived of showing such gross injustice by being unable to obtain this information from the said prosecuting officials.

This action of the Trial Court is therefore final and conclusive against your Petitioner for all times to come, to establish the charges and to institute proceedings in the Circuit Court of Appeals, to establish those charges, pursuant to its decision in 129 F. (2) 21, *supra*.

Petitioner therefore respectfully submits that the denial of the appeal by the Circuit Court of Appeals, on the court's own motion, that it had no jurisdiction, on the ground that the orders appealed from were not a final orders, and therefore not appealable, was error, and should be reversed; and that that court should be directed to consider the merits of the appeal, and to determine whether the trial court was, or was not, justified in denying the issuance of a *subpoena duces tecum* directed to the Attorney General of the United States and the District Attorney aforementioned, in the present proceeding, and that the Writ of Certiorari issued from this Court to prove the truth of Petitioner's charges and to establish justice.

The above is respectfully submitted,

.....

PAYSOFF TINKOFF,
Petitioner-Appellant, Pro Se.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	14
Conclusion	19

CITATIONS

Cases:	
Bronson v. *Schulten*, 104 U. S. 410	18
Hysler v. *Florida*, 315 U. S. 411	18
Tinkoff v. *United States*, 86 F. 2d 868, certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715	2
Tinkoff v. *United States*, 129 F. 2d 21	3, 17
Miscellaneous:	
Federal Rules of Civil Procedure (28 U. S. C. following 723c): Rule 27	14

704583—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 178

PAYSOFF TINKOFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 80–81) is reported at 153 F. 2d 106.

JURISDICTION

The judgment of the circuit court of appeals was rendered December 4, 1945 (R. 82), and a petition for rehearing was denied February 15, 1946 (R. 82–83). On May 15, 1946, an order was signed by Mr. Justice Murphy extending the time within which to file a petition for a writ of certiorari to June 14, 1946. A petition for a writ of certiorari was filed June 12, 1946. The

jurisdiction of this Court is apparently invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In our view, the only questions necessary to be considered are whether the district court erred in refusing to issue subpoenas *duces tecum* directed to the Attorney General and the United States Attorney for the Northern District of Illinois and to order the perpetuation of their testimony, and also in refusing to appoint an impartial physician to examine a prospective witness.

STATEMENT

On July 30, 1934, petitioner was convicted in the District Court for the Northern District of Illinois of attempting to prevent the collection of income taxes for the year 1928 due from one William J. Newman and two companies controlled by him, and he was sentenced to imprisonment for 18 months. On October 16, 1936, the judgment of conviction was affirmed. (*Tinkoff* v. *United States,* 86 F. 2d 868 (C. C. A. 7), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715.)

Some time in 1942, his prison sentence having been meanwhile fully served, petitioner filed in the Circuit Court of Appeals for the Seventh Circuit a motion for leave to file in the district court in which he was convicted a petition for a

writ of error in the nature of a writ of error *coram nobis* and a petition to vacate, set aside, and expunge the judgment of conviction of July 30, 1934. The former petition alleged that he was convicted on perjured testimony as a result of a conspiracy, knowledge of which did not come to him until July 30, 1934, the date of the conviction, between the prosecuting authorities and his co-defendant, Newman, who pleaded guilty and offered perjurious testimony on behalf of the prosecution in consideration of an agreement that he (Newman) would receive a light sentence. On July 7, 1942, the circuit court of appeals denied the motion for leave to file the petitions on the ground that petitioner had failed to state a *prima facie* case for the relief sought, for the reasons that the names of the persons referred to as the prosecuting authorities were not stated, no supporting affidavits were presented, and no disclosure made as to how or by whom he expected to prove his allegations. The court further stated that "Moreover, appellant satisfied the judgment by serving the term of imprisonment thereby imposed. Whether this would, as a matter of law, preclude the allowance of the motion, we need not decide. The fact, however, is a circumstance which we may properly take into consideration." (*Tinkoff* v. *United States*, 129 F. 2d 21.)

On November 16, 1942, petitioner filed in the

district court in which he was convicted a petition to perpetuate the testimony of certain named persons, including Newman and one Thomas F. Gayer, Newman's auditor. In it petitioner alleged that he feared that the testimony of the named witnesses would be lost by their deaths, failing memories, or removal from the jurisdiction. (R.[1] 2–8.) The purpose of the petition was to procure evidence within the knowledge of the named witnesses which would tend to substantiate the allegations made in the earlier petition for a writ of error *coram nobis* of the alleged conspiracy between the prosecuting officials and Newman, and thus to cure defects which the circuit court of appeals found in that petition when it denied leave to file it in the district court (see Pet. 2, 13). The petition was granted, and it was ordered that petitioner be permitted to take the depositions of the persons named (R. 10–11). On November 20, 1942, subpoenas *duces tecum,* directing these persons to produce various designated records alleged to be material to the inquiry before a court-appointed commissioner for examination by petitioner, were granted[2] (R. 14–19).

Gayer did not appear in response to the sub-

[1] The letter "R" is used herein to refer to the certified typewritten transcript of record on file in the office of the Clerk of this Court.

[2] Thereafter, numerous additional applications for subpoenas and subpoenas *duces tecum* addressed to other witnesses were granted (R. 20–31).

poenas due to severe illness, as attested by his personal physician, Robert E. Johannesen, who sent to the commissioner a letter, received November 25, 1942, certifying that Gayer had suffered, five weeks previously, a severe attack of coronary heart disease and that it would be dangerous to his health and life to have him appear as a witness in any controversial matter for the next six or eight weeks (R. 21, 23). On December 17, 1942, petitioner received a letter from Dr. Johannesen, which he filed in court as an exhibit, stating that four weeks after Gayer's heart attack, a blood clot was dislodged from his heart and entered his lung, causing serious illness from which he was convalescing, but which left him seriously weakened and ill, and that it was his (Johannesen's) belief that Gayer's life should not be further jeopardized by having either to testify in court or make a deposition in his home (R. 27, 29).

On January 25, 1943, petitioner requested a rule to show cause why Gayer and Newman should not be held in contempt for failure to comply with the subpoenas addressed to them. The motion for the rule alleged, in respect of Gayer, that petitioner, on December 18, 1942, and January 9, 1943, had sent letters to Dr. Johannesen inquiring as to the earliest possible date on which Gayer would be able to make a deposition, but that to date he had received no reply; that on January

15, 1943, petitioner had met Gayer in the city hall of Chicago, where Gayer was employed as a clerk in the Municipal Court; that he had told Gayer he was still awaiting a reply to his letters to Dr. Johannesen, and that Gayer told him that he would discuss the matter with his doctor and advise petitioner as to the earliest date on which he could undergo examination, but that Gayer had to date failed to communicate with petitioner. In respect of Newman, the motion alleged that Newman had failed to answer the subpoenas directed to him; that on December 9, 1942, his attorney had advised the commissioner that Newman was in a hospital under a doctor's treatment and that a certificate to that effect would be forwarded; but that no such certificate had to date been received. (R. 32–34.) The motion was granted, and a hearing on the rule to show cause was set for February 1, 1943 (R. 37), but the record does not disclose what, if any, further proceedings were had or what disposition was made of the rule.

On February 15, 1943, petitioner prayed for an order appointing an impartial physician to examine Gayer for the purpose of determining whether he was able to testify without endangering his life (R. 40–42). This request, apparently, was denied (see R. 55).

On June 18, 1943, petitioner moved "that a rule be entered by this Court directing the United

States District Attorney for this District, and the Attorney General of the United States to show cause why an order should not be entered directing that a Subpoena Duces Tecum be issued for said officials to produce any and all documents and statements, sworn or unsworn, made by William J. Newman, Nora Newman, Thomas F. Gayer, and Abe Salitsky, relating to the Income Tax Liability of William J. Newman and William J. Newman Company for the years 1926 to 1929 inclusive, and said statements being made prior to June 1934; and further to show cause why the said officials' testimony should not be perpetuated by said Paysoff Tinkoff, to support his petition to vacate the criminal conviction in June 1934, on the ground that a conspiracy existed between the said prosecuting officials and William J. Newman and others to bring about the illegal conviction by false and perjured testimony, and further by said public officials' suppressing testimony to show the innocence of said Paysoff Tinkoff of the charges aforementioned, same constituting a fraud upon the Court." As grounds for the motion, it was alleged that "a conspiracy existed between said William J. Newman; his sister, Nora S. Newman, his secretary; Thomas F. Gayer, his auditor; Abe Salitsky, his partner; and others, with the prosecuting officials to wit: the United States District Attorney for this District, and the United States Attorney General, to bring about

704583—46——2

the illegal conviction of Paysoff Tinkoff, the Income Tax Accountant for said William J. Newman, by having said William J. Newman and the others mentioned above testify falsely against your petitioner, all parties, including the prosecuting officials, knowing that said testimony to be given, and which was given, at the trial of your petitioner, was false and fictitious"; that Newman, Nora Newman, Gayer, and Salitsky were "promised with immunity from criminal prosecution"; and that Newman "was promised to get off with a light fine and no prison sentence." It was further alleged that "the said prosecuting officials—the United States District Attorney and the Attorney General of the United States—at all times knew that said Paysoff Tinkoff was absolutely innocent of any wrong regarding the Income Tax Liability of William J. Newman and his company, in that said William J. Newman, Nora Newman, and Thomas F. Gayer had several times testified before said prosecuting officials that said Paysoff Tinkoff; [sic] and that at one of the conferences at the Office of the Attorney General of the United States prior to the Trial in 1934 of your Petitioner, the said William J. Newman had again testified under oath that said Paysoff Tinkoff was absolutely innocent of the charge of assisting William J. Newman to evade his taxes and that of his Company, and that the said assistant Attorney Gen-

eral of the United States [sic] did then and there state to William J. Newman, in substance, as follows:

> We don't want you Mr. Newman, we want Mr. Tinkoff. We are out to get him. If you won't help us and put the blame on Mr. Tinkoff, we will go hard on you. Now think that over, and talk it over with your counsel, and come back and let us know."

It was further alleged that "the said prosecuting officials withheld and suppressed evidence in their possession which would show the absolute innocence of Paysoff Tinkoff"; that "the said testimony, false in all its parts, was carefully rehearsed by said William J. Newman and the others with the prosecuting officials"; that Newman paid his accountants and attorneys to assist the United States Attorney in prosecuting petitioner "so as to build up false testimony to illegally convict said Paysoff Tinkoff, and perpetrate a fraud upon the Court"; that Newman had died shortly prior to the filing of the motion and that petitioner was "unable to obtain a copy of the statements made by said William J. Newman to the prosecuting officials aforementioned"; that "all of the said statements of William J. Newman, Nora Newman, Thomas F. Gayer and Abe Salitsky have been previously demanded by your Petitioner for examination,

and same have been repeatedly refused"; that "all said statements, sworn and unsworn, your Petitioner alleges, on information and belief, which he believes to be true, have at all times and still are in the possession of the prosecuting officials"; that "an examination of the said statements and a copy of the same under the oath of the said prosecuting officials is absolutely necessary to support the allegations [of] your Petitioner's petition to vacate, of fraud and conspiracy"; and that due to the death of Newman, petitioner was "unable to obtain this evidence from any other source, other than the prosecuting officials aforementioned." (R. 47–51.) On October 23, 1944, the motion was denied (R. 62–63).

On December 11, 1944, petitioner again moved for an order appointing an impartial physician to examine Gayer. The motion alleged that an order had been entered in June 1943 excusing Gayer from being examined by petitioner on the ground that such an examination would dangerously impair his health, but that subsequently Gayer had continued to perform his duties as a clerk of the Municipal Court of Chicago and, in petitioner's opinion, was able, without danger to his health, to be subjected to examination. (R. 54 (a)–56.)

On December 18, 1944, Gayer filed in court a sworn affidavit stating that he was 71 years of age and employed in the clerk's office of the

Municipal Court of Chicago; that his regular hours of employment were from 9 A. M. to 5 P. M., but that he was allowed to report in the morning at his convenience, so as to be able to avoid the crowds on the streetcars and obtain a seat, due to the condition of his health; that for the same reason he was permitted to leave in the afternoon at any time he felt it necessary; that since his last heart attack in May 1944 he was absent from work until August 1, 1944; that since August 1, 1944, he had worked only four to five hours a day; that his work consisted of routine checking of reports from the traffic court; that he did not lift or move any of the ledgers used, his co-workers handling all duties requiring physical exertion even of a minor nature; that he was never rushed in his work, being given at all times plenty of time to accomplish his duties; that on returning home each afternoon he rested in bed for at least an hour under his doctor's orders; that in his home life he did nothing requiring physical exertion; and that he used street cars exclusively as his mode of conveyance since he was unable to walk up the stairs of the elevated lines (R. 57–58).

On the same day, there was filed in court a letter from Dr. Johannesen to one Walter C. Healy, in which Dr. Johannesen, in reply to a request as to whether Gayer's physical condition would permit him to undergo with safety

an examination by a court-appointed physician to determine whether he could safely be subjected to examination as a witness, stated that Gayer, on October 17, 1942, suffered coronary occlusion, otherwise known as a heart attack, which was so severe that he was revived only after three-quarters of an hour's artificial respiration by a pulmotor squad; that he remained at home in bed for two months, resuming work about January 10, 1943; that on February 8, 1943, the court (Judge Barnes) had instructed that Gayer not be subjected to any form of interrogation or excitement such as would be occasioned by bringing him into court as a witness; that this instruction was given after he (Johannesen) had replied in the affirmative to a direct question as to whether Gayer might be subject to a similar attack if he were subjected to interrogation; that Gayer continued to work at his job, with which he had been familiar for many years and which required no mental or physical strain, until early in May 1944, when he suffered a second coronary occlusion, necessitating his going to a hospital for 10 to 14 days, following which he stayed at home until August 1, 1944, when he resumed his occupation; that Gayer's last electrocardiograph, taken October 6, 1944, showed the presence of decided heart damage and coronary disease; that Gayer realized he might suffer a sudden fatal attack at any time, physical or

emotional strain being predisposing factors; that he continued to work because it was essential that he do so in order to earn a living and support his wife; that in the event of a third attack it would be necessary for him, if he survived, to remain in bed for several months; that death usually ensues after or during the third or fourth such attack; that to subject Gayer to a physical examination by a court-appointed physician to determine whether he could safely undergo examination as a witness would cause him emotional, mental, and physical strain comparable to being called actually as a witness; that in his opinion, due to Gayer's nervous and high strung nature, such an examination would jeopardize his life; and that in the event such an examination was ordered, he would be prepared to testify that the ordering of it was a direct contributing factor to any serious outcome thereof (R. 59–61).

On the same day (December 18, 1944), petitioner's motion was denied (R. 65).

Petitioner appealed to the circuit court of appeals both from the order denying subpoenas *duces tecum* addressed to the United States Attorney and the Attorney General and from the order refusing to appoint a physician to examine Gayer. The appealability of the orders was not controverted, but the court, on its own motion, dismissed the appeals for lack of juris-

diction on the ground that the orders were not final decisions within the meaning of Section 128 (a) of the Judicial Code (28 U. S. C. 225 (a)).

ARGUMENT

Pretermitting the question of the appealability of orders in proceedings to perpetuate testimony based apparently on Rule 27 of the Federal Rules of Civil Procedure (28 U. S. C. following 723c), and also the question of the availability of *coram nobis* (the foundational proceeding) in the federal courts, particularly where the attack is upon a sentence which has already been served, we submit that there can be no doubt that the district court did not abuse its discretion in making the orders in question. In respect of the order relating to the Attorney General and the United States Attorney, we think it plain from a reading of the various allegations of the motion (*supra,* pp. 6–10) that its vagueness and inconsistency justified the court in refusing to grant it.[3] Thus, it was alleged that Newman, Nora Newman, and Gayer had "several times testified before said prosecuting officials" to something concerning petitioner, but to just what was left undisclosed (*supra,* p. 8). Again, it was alleged that "at one of the conferences at the Office of the At-

[3] It may be pointed out that lack of specificity, as has been indicated (*supra*, p. 3), was the principal basis for the refusal of the circuit court of appeals to grant petitioner leave to file the *coram nobis* petition in the district court.

torney General of the United States" Newman had "again testified under oath" that petitioner was innocent, but that "the said assistant Attorney General of the United States" sought to induce him to "put the blame on" petitioner (*supra,* pp. 8–9). This was the first and only mention of any *assistant* Attorney General, all previous references having been to the United States Attorney for the Northern District of Illinois and the Attorney General. Nor was the name of the "assistant Attorney General" given. Again, while petitioner made various allegations as to testimony and statements having been made by and to various officials, he nowhere alleged that any such testimony or statements were ever recorded. Yet his motion requested that the United States Attorney and the Attorney General be directed "to produce" any and all documents and statements, sworn or unsworn, made by Newman, Nora Newman, Gayer, and Salitsky (*supra,* p. 7). Indeed, so far as Salitsky is concerned, the motion is even less revelatory than as to others with reference to the nature and substance of any statements he made to the prosecuting officials. Furthermore, it will be observed that the motion, in addition to requesting subpoenas *duces tecum* directing the United States Attorney and the Attorney General to produce documents, also requested that the "said officials' testimony be perpetuated" to support petitioner's application

to vacate his conviction on the ground that a conspiracy existed between "the said prosecuting officials" and Newman to bring about petitioner's conviction by perjured testimony. Presumably, the persons referred to as "the United States District Attorney for this District and the Attorney General of the United States" in that part of the motion requesting subpoenas *duces tecum* were the persons bearing those respective titles on June 18, 1943, the date of the motion, namely J. Albert Woll and Francis Biddle. Presumably, too, the persons referred to as "the said officials" in that part of the motion requesting permission to perpetuate "the said officials' testimony" were the same individuals. Obviously, the court was not required to grant leave to petitioner to interrogate them, since they did not occupy the offices of United States Attorney for the Northern District of Illinois and Attorney General of the United States, respectively, at the times the various statements "prior to June 1934," referred to by petitioner, were made. Without analyzing in greater detail the allegations of the motion, we think it is evident that the court, in its discretion, properly denied the motion.

In respect of the order refusing to appoint a physician to examine Gayer, we think it equally clear, in view of the circumstances (*supra,* pp. 10–13), that the court likewise properly exercised its discretion in denying the motion.

Moreover, attention is called to several factors which undermine the possibility that petitioner will ever be able to utilize *coram nobis,* in support of which the proceedings to perpetuate testimony were brought. While the circuit court of appeals did not base its opinion denying petitioner permission to file his application for the writ in the district court upon the ground that he had not been diligent, that opinion indicates that petitioner knew of the alleged conspiracy between the prosecuting officials and Newman as early as July 30, 1934 (129 F. 2d, at 22), the date of his conviction.[4] Also, the Department file indicates that petitioner made the alleged conspiracy the basis for a petition for a writ of habeas corpus which he filed in the Eastern District of Michigan on July 9, 1937, to secure his release from the United States Detention Farm at Milan, Michigan, where he was serving his sentence. Furthermore, in an opinion by the Circuit Court of Appeals for the Seventh Circuit rendered November 10, 1938 (101 F. 2d 341), relating to an appeal from petitioner's disbarment by the United States District Court for the Northern District of Illinois, reference is made (p. 342) to petitioner's answer to the disbarment petition to the effect "that his conviction in the criminal

[4] In his petition to perpetuate the testimony of Newman and Gayer it was alleged, however, that knowledge of the conspiracy came to petitioner "subsequent to the entry of the order of conviction on July 30, 1934" (R. 3).

case had been obtained as a result of perjury committed with the knowledge and consent of the prosecuting officials * * *." It is thus evident that considerably more than four years before petitioner filed his application in the circuit court of appeals for permission to apply to the district court for *coram nobis,* he was aware of the alleged conspiracy upon which he predicated his application. The applicant for relief by *coram nobis* must proceed with diligence (cf. *Bronson* v. *Schulten,* 104 U. S. 410, 417–418), and lack of diligence casts doubt upon the verity of his allegations (cf. *Hysler* v. *Florida,* 315 U. S. 411, 417, 422).

Additionally, the Department file indicates that petitioner's application for habeas corpus in Michigan in July, 1937, was denied after a hearing at which the merits of his claim were considered.[5] There is no mention of the habeas corpus proceeding in the opinion of the circuit court of appeals denying petitioner leave to proceed in the district court by *coram nobis.*

[5] This proceeding was apparently not reported. While there is reference in the Department file to an appeal from the order of denial, the file does not disclose whether an appeal was pressed or its result, and no reported decision covering the appeal has been found. Since the file indicates that petitioner was released from the Milan Detention Farm on or about November 13, 1937, the probability is that the case had become moot before it could be heard or decided by the circuit court of appeals.

CONCLUSION

The petition for a writ of certiorari does not, in our opinion, present any question requiring review by this Court. We therefore respectfully submit that it should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

JULY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946